

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1461

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROLAND SMITH,

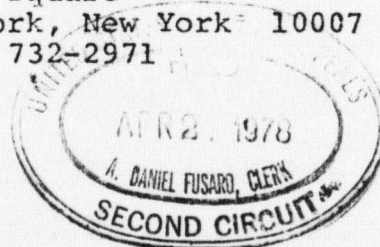
Defendant-Appellant.

Docket No. 77-1461

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

MARTIN ERDMANN,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

BARRY BASSIS,
Of Counsel.



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
:
:
UNITED STATES OF AMERICA, :
:
Plaintiff-Appellee, :
:
-against- : Docket No. 77-1461
:
ROLAND SMITH, :
:
Defendant-Appellant. :
:
-----X

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

Appellant Roland Smith seeks rehearing with a suggestion for rehearing en banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, from a judgment* of a panel of this Court (Mulligan and Gewin, C.JJ.; Miller, J.**) dated April 13, 1978. The judgment affirmed a judgment of conviction rendered by the United States District Court for the Southern District of New York (Cannella, D.J.) for conspiracy (18 U.S.C.

*A copy of the opinion is annexed hereto as A.

**Judge Gewin is a judge of the United States Court of Appeals for the Fifth Circuit; Judge Miller, a judge of the United States Court of Customs and Patent Appeals.

\$371), bank robbery (18 U.S.C. §§2113(a) and 2), and armed bank robbery (18 U.S.C. §§2113(d) and 2).*

The principal issues raised on this appeal concern the admissibility of appellant's confession under various provisions of the Juvenile Delinquency Act.

On March 30, 1977, three men robbed the National Bank of North America at 200 Lexington Avenue.** On April 4, 1977, a complaint was filed and warrants issued by The Honorable Harold J. Raby for the arrest of appellant Roland Smith and Stanley McDuffie for that robbery (Record on Appeal, Document #1). Both were taken into custody three days later. Thereafter, appellant moved to suppress a confession on the ground that it was involuntary and taken in violation of his rights under the Juvenile Delinquency Act (18 U.S.C. §§5032, 5033). A hearing was held before Judge Cannella on June 15, 16, and 20, 1977.***

The Government's witnesses testified to the following facts: After learning from the FBI that appellant, a 17-year old,**** was wanted for bank robbery, two New York City detectives -- Carbone and Fox -- arrested appellant at his home in

*The concurrent sentence imposed on the bank robbery was vacated.

**A fourth man allegedly waited outside the bank with the getaway car.

***Minutes of these proceedings, which are separately paginated, are referred to as S.I, S.II, and S.III, respectively.

****Following a hearing held on May 12, 1977, appellant was transferred to adult status under 18 U.S.C. §5032.

Brooklyn on April 7, 1977, at 10:30 a.m. (S.II 2, 3, 8). In the presence of Ida Brown, his grandmother and legal guardian, appellant was told of the bank robbery charge and given Miranda warnings. Appellant answered affirmatively when asked if he understood the warnings (S.II 4, 5). Detective Carbone gave appellant's grandmother his name and telephone number; she called twice before 3:00 p.m. to inquire as to appellant's whereabouts (S.II 6, 8, 9).

The detectives took appellant to the 84th Precinct, where he was turned over to two FBI agents at 10:30 a.m. (S.I 8; S.II 7). The agents took appellant to the United States Attorney's office, arriving at 11:00 a.m. (S.I 22; S.III 33). En route, one of the agents read appellant his rights, using the adult form, since he had never arrested a juvenile (S.I 27). As the Assistant United States Attorney assigned to the case was unavailable, appellant was taken to the United States Marshal for fingerprinting, and then to a pretrial services officer for a bail interview (S.I 22). At the conclusion of the interview at 12:15 p.m., the officer called appellant's grandmother (some time between 12:30 and 2:30 p.m.) to verify the information the youth had provided (S.III 34, 35). Although the probation officer did not remember all the grandmother said during their conversation, he did recall her asking him to call back with the results of the bail hearing (S.III 36, 37).

At about 12:50 p.m., the Assistant United States Attorney, John Flannery, who was assigned to the case, learned from the

District Attorney of New York County that the latter's office would not prosecute (S.III 18, 19, 20). Mr. Flannery discussed the facts of the case with the agents and read the complaint. Flannery was then aware that an accomplice had implicated both appellant and McDuffie (who was arrested later in the day) and that the stolen money and weapon had not been recovered. In addition, the fourth accomplice had not been apprehended (S.III 24). After reviewing the provisions of the Juvenile Delinquency statute, the Assistant United States Attorney asked a probation officer to attend appellant's interrogation (S.I 31; S.III 19, 20). However, neither Mr. Flannery nor the agents made an effort to contact appellant's grandmother, although they were aware that she was appellant's guardian, and Mr. Flannery admitted to feeling some "concern" at the time about his failure to contact her (S.III 21, 29; S.I 27, 28).^{*} Flannery called the magistrate's office and spoke to The Legal Aid Society office so that an attorney could be present at arraignment (S.III 26).

At 1:45 or 1:50 p.m., appellant was taken to Flannery's office, where the Assistant United States Attorney introduced himself, the two FBI agents, and the probation officer (S.III 22). Appellant was told that he had been arrested for bank robbery, "a serious offense because it carries with it a very

^{*}During his telephone conversations with appellant's grandmother, Detective Carbone told her that appellant had been turned over to the FBI and delivered to the United States Attorney's office.

serious penalty involving 20 years and a \$1,000 fine" (S.III 22). Appellant was again read the standard warnings, in response to which he said "yes," "noddod," or "grunted" (S.I 30; S.III 30). Appellant was then questioned for 45 minutes to an hour (S.I 26), during which he confessed to the crime, supplying various details about its commission. At about 3:00 p.m., he was taken before a United States magistrate and counsel was assigned (S.I 26).

The district judge denied the suppression motion in a memorandum decision* in which he found that appellant had been given proper Miranda warnings. The district judge also rejected appellant's argument that statements made prior to a transfer hearing should have been excluded under 18 U.S.C. § 5032, and additionally found no violation of appellant's rights under §5033 to a prompt arraignment and the assistance of his guardian.

At trial, appellant's confession, recounting details of the crime, constituted the key evidence against him (249-260).** In the prosecutor's words, "there is no identification issue in this case. You have got the confession of Roland Smith" (330). Two bank employees who were witnesses to the crime testified, but neither had selected appellant at a lineup or could make an in-court identification (57-59, 69-18, 69-19). Bank surveillance photographs were introduced, but the robber purported

*The district court opinion is annexed hereto as B.

**Numerals without letter designations refer to pages of the trial transcript dated July 13-19, 1977.

to be appellant looked so unlike him that blowups of the photographs were made at the request of the defense (4, 80), and the dissimilarity was the basis of the defense argument in summation (315, 324). Appellant's fingerprints and palm prints were taken, but did not match those left by the bank robbers (275-279).

In addition to the confession, the Government's case rested upon the accomplice testimony of Stanley McDuffie and Fred Bellamy, both of whom had prior robbery convictions and had pleaded guilty to the instant bank robbery and were awaiting sentencing (87, 123-124, 192-194). They both identified appellant as the one who leaped over the teller's counter along with McDuffie; however, when shown the surveillance photographs, McDuffie recanted and claimed that the man looked like "E.J." (Ernest Bathea)* (112-113, 120-122, 175-177, 118-121).

In an opinion dated April 13, 1978, this Court rejected appellant's claims that his confession should have been suppressed on the grounds that his arraignment was delayed in violation of 18 U.S.C. §5033 and that the statements should have been excluded under §5032 because they were made prior to a transfer hearing. The opinion did not deal with appellant's claim that the Government violated his rights under §5033 because of the failure to ascertain whether his grandmother under-

*Bathea was allegedly the fourth man, who hailed the cab in this impromptu bank robbery (120, 172).

stood the Miranda warnings and the failure to provide appellant with an opportunity to confer with her.

ARGUMENT

A. The failure to take appellant before a magistrate forthwith was error.

Following his arrest at 10:15 a.m. on April 7, 1977, appellant was taken to the police station and turned over to FBI agents. Shortly after 11:00 a.m., the agents arrived with appellant at the office of the United States Attorney for the Southern District of New York. Appellant was first taken to the Marshal's office for processing, then to a pretrial services officer for a bail interview. At 1:50 p.m., he was interrogated for nearly an hour by an Assistant U.S. Attorney. Only after the confession was secured was appellant taken for arraignment. This Court's opinion, finding that this delay was no unreasonable under 18 U.S.C. §5033, constitutes an unwarranted retreat from the principle enunciated in United States v. Binet, 442 F.2d 296 (2d Cir. 1971), and United States v. Glover, 372 F.2d 43 (2d Cir. 1967).

The relevant portion of §5033 provides that, following arrest,

[t]he juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

In United States v. Binet, supra, and United States v. Glover, supra, which dealt with similar language in §5033's predecessor statute,* this Court recognized the strong Congressional concern expressed therein for protection of the rights of juveniles. As the Court stated in those cases:

... Treatment of an accused juvenile after arrest as a chattel in the possession of the officers, deliverable at will to the inspectors' offices for interrogation is a plain departure from the command of the statute for forthwith production of the juvenile before a magistrate. Statements taken while the statute is being ignored in this fashion must be held inadmissible.

United States v. Binet, supra,
442 F.2d at 299.

The facts of the instant case are strikingly similar to those in Binet,** where the defendant was brought to the courthouse, where a magistrate was "presumably available" (id., 442 F.2d at 299), but was not brought before a magistrate and given "unbiased advice" (id.) of his constitutional rights until after he had been questioned by an Assistant U.S. Attorney in the presence of two other law enforcement officers. Appellant was not taken before a magistrate until four hours after his arrival at the courthouse;

*Former §5035 provided that "[u]nless the juvenile is taken 'forthwith' before a committing magistrate, detention shall not 'be for a longer period than is necessary to produce the juvenile before a committing magistrate.'" United States v. Glover, supra, 372 F.2d at 46; emphasis supplied by the Court.

**Though appellant was older than Binet at the time of his arrest, he was the same age as the defendant in Glover. Moreover, unlike those cases, appellant's arrest was predicated upon a complaint secured by the U.S. Attorney's office as well as a warrant which ordered the arresting officer to take him "forthwith before the nearest available United States Magistrate...."

the comparable delay in Binet was five hours. The opinion in the instant case seeks to distinguish Binet on the ground that interrogation here had "a valid investigative purpose." Slip op. at 2486. However, the Binet decision (442 F.2d at 300) cites as an example of a justifiable pre-arraignment interrogation the one in United States v. Hall, 348 F.2d 837, 842-843 (2d Cir. 1965). In sharp contrast to the instant case, Hall was arrested in the late afternoon. By the time the FBI agents had fingerprinted and photographed him, there was no Commissioner available to arraign him (348 F.2d at 842). Moreover, there was a danger that by the next day Hall's accomplice would abscond with the stolen bonds. By the time of appellant's arrest, Bellamy had been apprehended and a warrant had been issued for McDuffie, who was taken into custody the same day as appellant. The only bank robber still at large was Ernest Bathea, who was the least culpable.*

The Court erroneously attempts to distinguish United States v. Glover, supra, on the ground that "the interval before the juvenile was taken to the magistrate [was] substantially shorter [in the instant case, and] Smith was never detained in a prison

*Bellamy and McDuffie had planned the robbery and entered the bank, while Bathea hailed the getaway cab. Furthermore, the questions asked by the Assistant U.S. Attorney were directed primarily at extracting an admission of appellant's guilt. From inquiries about his background, appellant was suddenly asked how long he had known McDuffie (for whom a warrant had been issued and whose whereabouts were known); then the prosecutor asked how appellant happened to be in the bank that day, which precipitated the confession (255-256).

facility prior to his interview with the Assistant U.S. Attorney." Slip op. at 2486. The Court in Glover was not concerned about the fact that the juvenile, who was arrested at 6:00 p.m., spent the night in jail. Rather, it was the delivery of Glover the next morning to the inspector's office for interrogation instead of to the courthouse for arraignment that contravened the statute. United States v. Glover, supra, 372 F.2d at 47. In fact, the crucial delay in Glover -- from 9:00 a.m. when he was taken to the postal inspector until 10:30 a.m. when he was arraigned -- was considerably shorter than the delay in this case.

The opinion of the Court disregards the firm command of the statute for "forthwith" production before a magistrate, and is inconsistent with Binet and Glover.

B. The statements made by appellant prior to the transfer hearing must be suppressed.

The Court's opinion, in a case of first impression in this Circuit, misinterprets the final paragraph of 18 U.S.C. §5032, which provides:

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.

Since appellant's statements to the prosecutor were made prior to the transfer hearing, the confession should not have been admitted at his trial.

Rather than disallow the confession under §5032, the Court follows the holding in United States v. Spruille, 544 F.2d 303

(7th Cir. 1976), and United States v. Cheyenne, 558 F.2d 902 (8th Cir. 1977), that the provision "meant to prohibit only those statements made by a juvenile in connection with a transfer hearing." Slip op. at 2490. That this is an erroneous view of the meaning of the provision is manifested by the legislative commentary, which states, "Statements made prior to a transfer hearing are made inadmissible for the purposes of any criminal prosecution." 1974 U.S. Code Cong. & Admin. News 5320. Thus, the Court's opinion not only declines to follow the "plain meaning" of the statute (see United States v. American Trucking Ass'ns., Inc., 310 U.S. 534, 543 (1940)), but does so without any support in the legislative history. In fact, contrary to the Court's interpretation, the history of the Juvenile Delinquency Act reveals it as an attempt "to provide basic procedural rights for juveniles who come under Federal jurisdiction and to bring Federal procedures up to the standards set by various model acts, many state codes, and court decisions" -- to enact "a model code for juveniles." 1974 U.S. Code Cong. & Admin. News 5284, 5312.

The Court sought to justify its rejection of the unambiguous language of the statute by claiming that to do otherwise would have the "anomalous effect of making such statements admissible where no transfer hearing at all was held, thus penalizing the more immature and less dangerous juveniles who are not treated as adults." Slip op. at 2489. The Court failed to perceive that the younger juveniles, whose confessions would be

admissible, would be treated within the more benign provisions of the Juvenile Delinquency Act (see, e.g., 18 U.S.C. §§5034-5042),* while those, like appellant, who are transferred to adult status, face the possibility of obtaining criminal records and serving 25-year prison sentences.

Section 5032 clearly bars the introduction of appellant's statements, which were made prior to the transfer hearing.

C. The failure to allow appellant to confer with his guardian or to ascertain whether she understood the Miranda warnings requires reversal.

Between the time of appellant's arrest and arraignment, during the period when the confession was extracted, appellant's grandmother and legal guardian twice called the arresting officer to determine appellant's whereabouts. Again, when the pre-trial services officer called to verify the bail information, appellant's grandmother asked the officer to call her back with the results of her grandson's court appearance. Though, as the district court found, the grandmother exhibited "grave concern for her grandson" (District Court op. at 8), she was effectively prevented from assisting him. This Court's opinion fails to consider the claim that appellant was deprived of his right to confer with his guardian and to ensure that she understood the Miranda warnings.

*The admissions of those treated within the Act are not "freely admitted," but must still meet constitutional standards. In re Gault, 387 U.S. 1 (1967).

Section 5033 provides, in relevant part:

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

Though appellant's grandmother was present at his arrest when he was told of the charges and informed of his rights, the detectives made no effort to determine whether she understood the Miranda warnings. Nor did the Government establish that she was accorded the opportunity to consult with appellant before he was taken from the house. Though the statute requires notification of a guardian, the prosecutor, after reviewing the Juvenile Delinquency Act, contacted a probation officer to attend the questioning. Neither the prosecutor nor the FBI agents tried to contact the grandmother at any time. The presence of the probation officer -- another representative of the Government -- not only failed to safeguard appellant's rights, but added to the coercive atmosphere.

The failure of the agents and the prosecutor to comply in any meaningful way with the requirement of §5033 invalidates appellant's confession.

In sum, the opinion in the instant case undercuts the established law of this Circuit as expressed in Binet and Glover, establishing the rights of juveniles to a prompt arraignment. Moreover, it rejects the clear language of the Juvenile

Delinquency Act that statements prior to a transfer hearing are inadmissible in criminal prosecutions and fails to ensure the adequate assistance of the juvenile's guardian following his arrest.

CONCLUSION

For the foregoing reasons, rehearing or rehearing en banc should be granted.

Respectfully submitted,

MARTIN ERDMANN,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

LARRY BASSIS,
Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 749—September Term, 1977.

(Argued March 14, 1978 Decided April 13, 1978.)

Docket No. 77-1461

UNITED STATES OF AMERICA,

Appellee,

—against—

ROLAND SMITH,

Defendant-Appellant.

Before:

GEWIN* and MULLIGAN, *Circuit Judges*
and MILLER, *Judge.***

Appeal from judgment of conviction entered in the United States District Court for the Southern District of New York, Hon. John M. Cannella, *Judge*, for violations of 18 U.S.C. § 371, 18 U.S.C. §§ 2113(a) and 2, and 18 U.S.C. §§ 2113(d) and 2.

Affirmed.

Sentence on 18 U.S.C. § 2113(a) vacated.

* United States Court of Appeals for the Fifth Circuit, sitting by designation.

** United States Court of Customs and Patent Appeals, sitting by designation.

ROBERT N. SHWARTZ, Asst. United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Richard Weinberg, Asst. United States Attorney, of Counsel), *for Appellee*.

BARRY BASSILS, Legal Aid Society, New York, New York (Martin Erdmann, Legal Aid Society, New York, New York), *for Defendant-Appellant*.

MULLIGAN, *Circuit Judge*:

Roland Smith appeals from a judgment of conviction entered on September 6, 1977 in the United States District Court for the Southern District of New York after a four-day jury trial before the Hon. John M. Cannella, United States District Judge. On July 19, 1977, the jury returned a verdict of guilty on three counts: Count One, conspiracy, 18 U.S.C. § 371; Count Two, bank robbery, 18 U.S.C. §§ 2113(a) and 2; Count Three, armed bank robbery, 18 U.S.C. §§ 2113(d) and 2. Judge Cannella imposed concurrent prison sentences of five years on Count One and eight years on Counts Two and Three. The judgment of conviction is affirmed. However, the sentence on Count Two (bank robbery) is vacated since it is a lesser included offense of Count Three (armed bank robbery). The government has conceded that this sentence must be vacated. *United States v. Oliver*, 523 F.2d 253, 260 (2d Cir. 1975).

The evidence fully supported the convictions here. Roland Smith, with three colleagues, Fred Bellamy, Stanley McDuffie, and Ernest Bethea planned and executed the armed robbery of a branch of the National Bank of North America in New York City on March 30, 1977. Smith, Bellamy and McDuffie robbed the bank, while

Bethea waited outside and hailed the cab which provided their getaway to Brooklyn where they later divided up the loot. Appellant Smith does not contest the sufficiency of the evidence against him which included the testimony of two of his fellow bank robbers as well as his own admission of participation in the crime. The arguments upon this appeal hinge upon the fact that at the time the crime was committed Smith was seventeen years of age and thus claims the protections of the Juvenile Delinquency Act 18 U.S.C. § 5031, *et seq.* Specifically, Smith argues that the time interval between his arrest and his initial appearance before the magistrate was unreasonable and in violation of 18 U.S.C. § 5033. He also urges that 18 U.S.C. § 5032 mandates the suppression of all statements made by him prior to a transfer hearing to consider whether he should be proceeded against as an adult. Since his admissions were made prior to the transfer hearing before Judge Brieant on May 12, 1977 appellant alleges the district court erred in not suppressing these statements. Smith also attacks the finding that his confession was voluntary.

I

After a three-day suppression hearing, Judge Cannella found the following facts. Smith was arrested on April 7, 1977 at 10:15 a.m. at the home of his grandmother, Ida Brown, by New York City Police detectives. In the presence of his grandmother, Smith was advised of the nature of the charge and of his constitutional rights. The appellant indicated he understood. Mrs. Brown was told where her grandson was going and a detective gave her his phone number so that she could contact him if she had any questions about her grandson. Between 10:30 and 10:45 a.m. Smith was placed in the custody of FBI agents at a Brook-

lyn precinct station. The federal officers again advised him of his rights and again the defendant indicated he understood them. He was then brought to the United States Attorney's office in Manhattan and on the way Smith was advised of his rights for the third time. At about 11:00 a.m. Smith was processed by the Marshal's office. He was interviewed at 1:45 p.m. by an Assistant United States Attorney who advised him of his constitutional rights for the fourth time. During his forty minute interview Smith admitted participating in the bank robbery and receiving a share of the stolen proceeds. At 3:00 p.m. Smith was taken before a magistrate.

At no time did Smith ever indicate a failure to understand his rights and he never asked for an attorney. At the time of this interview a sawed-off shotgun used in the robbery was still missing, as was most of the stolen cash. The fourth robber (Bethea) had not been identified or apprehended.

We find no reason at all to question the voluntariness of Smith's admissions of complicity during his interview by the Assistant United States Attorney. Although his I.Q. score was admittedly low, Judge Bricant, at the transfer hearing, found Smith to be of average intelligence. Appellant had numerous previous encounters with the criminal justice system involving various assaults, robberies and larcenies which made him "street-wise" and fully conversant with his rights which were here articulated to him on four occasions. On each occasion he indicated that he understood them. The record contains absolutely no suggestion of coercion during the forty minute interrogation of appellant by the Assistant United States Attorney. Smith's grandmother was aware of her grandson's whereabouts after his arrest. Neither she nor Smith testified at the suppression hearing. It is clear from all the surround-

ing circumstances that the confession was voluntary. *Boulden v. Holman*, 394 U.S. 478 (1969).

II

18 U.S.C. § 5033 provides:

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensible to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

Smith urges that he was detained "for longer than a reasonable period of time before being brought before a magistrate." Thus, he contends, his confession must be suppressed. Appellant relies upon two previous decisions of this court on this point, *United States v. Binet*, 442 F.2d 296 (2d Cir. 1971) and *United States v. Glover*, 372 F.2d 43 (2d Cir. 1967), both of which are distinguishable from the instant case.

In *Binet* a 15 year-old defendant had been observed committing the crime and all his co-defendants were in custody at the time of interrogation when he made his confession. As this court observed, "There was no need to question appellant for investigatory purposes for the participants in the crime were caught while perpetrating it." 444 F.2d at

299. Here, as indicated, a participant was still unapprehended; most of the loot and a firearm were still to be retrieved. Thus, the interview served a valid investigatory purpose.

In *Glover*, the juvenile was also 17 but although he was arrested at 6:00 p.m. he was not arraigned until 10:30 a.m. the next day. The crime charged (passing a forged and altered money order) did not involve violence. No weapon remained at large. The defendant made his confession to a Postal Inspector after spending the night in the Federal House of Detention. Here, not only was the interval before the juvenile was taken to the magistrate substantially shorter, but Smith was never detained in a prison facility prior to his interview with the Assistant United States Attorney.

We note further that both *Binet* and *Glover* were decided under the predecessor version of 18 U.S.C. § 5033 which provided that detention shall not "be for a longer period than is *necessary* to produce the juvenile before a committing magistrate" (emphasis supplied).¹ The present version has eliminated the word "necessary" and substituted "for longer than a *reasonable* period of time" (emphasis supplied). While we find nothing in the legislative history to indicate the reason for this change in the language of the statute, there is clearly no reason to believe that it imposes any more rigorous criterion than that applied in our previous decisions. We conclude that Judge Cannella properly determined that the time lapse between arrest and arraignment before the magistrate was reasonable under the circumstances and consequently, there was no violation of 18 U.S.C. § 5033.

¹ The predecessor of 18 U.S.C. § 5033 was then 18 U.S.C. § 5035, 62 Stat. 858 (1948).

III

Appellant also argues that his admissions must be suppressed based upon the last sentence of § 5032 which provides, "Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions." Section 5032 details the procedures whereby a juvenile, not surrendered to state authorities, may be transferred after a hearing to the status of an adult defendant in a criminal case in the district court.² On May 12, 1977 a transfer hearing

² § 5032. Delinquency proceedings in district courts; transfer for criminal prosecution

A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to an appropriate district court of the United States that the juvenile court or other appropriate court of a State (1) does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, or (2) does not have available programs and services adequate for the needs of juveniles.

If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State.

If an alleged juvenile delinquent is not surrendered to the authorities of a State or the District of Columbia pursuant to this section, any proceedings against him shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The Attorney General shall proceed by information, and no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided below.

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile sixteen years and older alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony punishable by a maximum penalty of ten years imprisonment or more, life imprisonment, or death, criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such

in this case was conducted before Hon. Charles L. Bricant, United States District Judge for the Southern District of New York, who concluded that Smith's transfer to adult status was in the interests of justice. No claim of irregularity in these hearings is made by Smith. The statements sought to be suppressed were those made to the Assistant United States Attorney on April 7, 1977. Clearly these were made prior to the hearing of May 12, but has no bearing upon the determination of Smith's being held as an adult. Thus, the issue before us is whether the last sentence of § 5632 is to be read literally and in isolation or, as the government contends, suppression should be limited to those statements made by a juvenile *in connection with* a transfer hearing.

The only authority on point accords with the government's position here. *United States v. Spruille*, 544 F.2d

court finds, after hearing, such transfer would be in the interest of justice.

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. The juvenile shall be assisted by counsel during the transfer hearing, and at every other critical stage of the proceedings.

Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.

303 (7th Cir. 1976); *United States v. Cheyenne*, 558 F.2d 902, 906-07 (8th Cir. 1977). The court in *Spruille* reviewed this issue in considerable detail and we concur in its conclusion that the last sentence of § 5032 cannot be interpreted literally.

As the *Spruille* opinion demonstrates, the last sentence of § 5032 is unclear—it does not in terms prohibit the use of all statements made at any time by the juvenile without regard to the transfer hearing. Its focus upon the transfer hearing and its placement within § 5032 lead to the construction which best serves the intended purpose of the statute. The statutory scheme of § 5032 discloses the necessity of obtaining the cooperation of the juvenile in determining if a motion of transfer should be filed. Such factors as his social background, intellectual development and psychological maturity are essential in determining whether he should be tried as an adult. His revelation of this material in aid of the court determination which will be crucial to his welfare should not be used against him. However, his prior confession of crime at the time of his arrest or interrogation stands on a different footing. There is nothing in the Juvenile Delinquency Act, as amended in 1974, which would indicate that such a basic change, as the broad exclusionary rule argued for here, was intended. Had it been, surely there would have been some evidence of it in the legislative history of the statute—there is none. Moreover, a blanket prohibition against all statements made prior to the transfer hearing and having no relation to it would seriously impede the prosecution of dangerous juvenile offenders tried as adults. The interpretation urged by the defendant here would have the anomalous effect of making such statements admissible where no transfer hearing at all was held, thus penalizing the more immature and less dangerous juveniles who are not treated as adults. This incongruous result could not

have represented the congressional intent. We therefore find that the last sentence of § 5032 must be read to mandate the suppression of statements made by a juvenile only when they have been made in connection with a transfer proceeding. The statements made here were not so connected and therefore were admissible in the trial in the district court.

The judgment of conviction is affirmed and the sentence on Count Two is vacated.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA	:	MEMORANDUM
-against-	:	<u>DECISION</u>
ROLAND SMITH,	:	S77 Cr. 280
Defendant.	:	

-----X

CANNELLA, D.J.:

Motion pursuant to Fed. R. Crim. P. 41(f), seeking to suppress a statement given by the defendant to an Assistant United States Attorney, is hereby denied.

THE FACTS

On April 7, 1977 at approximately 10:15 a.m. Roland Smith was arrested by New York City Police Detectives William Carbone and James Fox at the home of his grandmother, Ida Brown. The detectives identified themselves to Smith and his grandmother and informed them that Smith was being arrested for the March 30, 1977 bank robbery of the 200 Lexington Avenue branch of the National Bank of North America. Mrs. Brown was present when Detective Carbone gave Smith the Miranda warnings, and the defendant indicated that he understood his rights. Neither Smith nor his grandmother requested the assistance of an attorney.

After Mrs. Brown was told where Smith would be taken and was given a telephone number where Detective Carbone could be reached, Smith was escorted to the 84th Police Precinct. F.B.I. Special Agent Raymond Bernard was immediately advised of Smith's arrest and proceeded to the police station with Special Agent Vogt in order to place the defendant in federal custody. This occurred sometime between 10:30 and 10:45 a.m. As the police officers had done, Agent Bernard introduced himself and Vogt to Smith, explained to him the nature of the federal arrest and advised him of his rights. Smith again indicated his understanding and did not request an attorney.

The federal agents then took Smith directly to the Office of the United States Attorney for the Southern District of New York, arriving at approximately 11:00 a.m. The agents deviated from the usual practice of first processing the arrestee at F.B.I. Headquarters because they believed Smith to be a juvenile. During the car ride, Smith was again given the Miranda warnings, but was not questioned. At the United States Attorney's Office, Smith was interviewed by Arthur Rucks of the Pre-Trial Services Agency in order to gather information for the setting of bail. The interview lasted approximately from 11:50 a.m. until 12:15 p.m. Smith was also processed by the Marshal's Office during this time period.

Following the interview with Rucks, the defendant was taken to the office of Assistant United States Attorney John Flannery, to whom the case had been assigned. Before speaking with Smith, Flannery reviewed the Juvenile Delinquency Act, 18 U.S.C. § 5031 et seq., and consulted with a colleague regarding special procedures to be followed when interviewing a juvenile. He also spoke with the agents in order to familiarize himself with the facts of the case. Flannery learned that one of the bank robbers was still at large, and that the shotgun used in the robbery as well as most of the purloined money had not been recovered. Finally, Flannery contacted the Office of the Manhattan District Attorney and learned that the state authorities would decline to prosecute Smith. See 18 U.S.C. § 5032.

In addition to Smith and Flannery, Agents ^{Bernard} Carbone and Fox[✓] as well as Thomas Eich of the United States Probation Department, were present at the interview. Eich's presence had been specifically requested by Flannery because of Smith's juvenile status. Flannery began the interview by reading Smith the Miranda warnings. Smith indicated he understood his rights and was willing to answer questions. At no time did Smith request an attorney. Following the warnings, Smith made certain statements which are the subject of the instant motion to suppress. The interview, which had

begun at approximately 1:50 p.m., lasted about forty minutes. At approximately 3:00 p.m., the defendant was brought before Magistrate Jacobs, assigned counsel and arraigned. The Court finds that at no time was there any suggestion or use of coercion or duress, either direct or indirect.

On May 12, 1977, after a hearing, the Honorable Charles L. Brieant granted the Government's motion to transfer Smith to adult status.

DISCUSSION

The grounds advanced for the instant motion are twofold: firstly, that the proper Miranda warnings were not given; and secondly, that the Government failed to comply with the provisions of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42. Finding both arguments to be without merit, the Court declines to suppress the statements made to Assistant United States Attorney Flannery.

Miranda Warnings

It is clear from the testimony in the case that on all occasions the defendant was given the proper Miranda warnings. There is no support for defendant's assertion that in effect he was read a "seed catalog" series of questions. The federal agents, as well as the police

detectives, were meticulous in giving Smith the warnings and ascertaining that he understood his rights. See Miranda v. Arizona, 384 U.S. 436, 444 (1966). Similarly, the Assistant United States Attorney was careful to explain to Smith the Miranda rights as well as the nature of the arrest. This basis of defendant's suppression motion therefore fails.

Juvenile Delinquency Act Protections

18 U.S.C. § 5032

This section of the Juvenile Delinquency Act concerns the transfer of a juvenile to adult status for criminal prosecution and provides, in part, that "[s]tatements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions." In that the statements at issue were made prior to the transfer hearing at which Judge Brieant presided, defendant claims that § 5032 mandates their suppression.

The Court disagrees with defendant's interpretation of this provision. Although a literal reading of the above-quoted language seemingly supports this argument, such a reading makes little sense in the context of the entire section. Clearly, the last sentence of § 5032 was meant to prohibit only those statements made by a juvenile

in connection with a transfer hearing. United States v. Spruille, 544 F.2d 303 (7th Cir. 1976); United States v. Cheyenne, 420 F. Supp. 960 (D.S.D. 1976). It therefore follows that "statements made by the Defendant prior to the commencement of transfer proceedings and having no connection with those proceedings, are admissible in subsequent criminal proceedings." United States v. Cheyenne, supra at 962.

In addition to having been rejected in the only two reported cases to have dealt with the issue, defendant's construction of § 5032 conflicts with the very purposes of the Act. Under this interpretation, statements given by the older and more mature juveniles who are the subject of transfer hearings would be suppressed while, at the same time, statements of younger and more inexperienced juveniles would be freely admitted into evidence at their trials. Congress could not have intended the statute to be such an antilogy.

It is undisputed that the statements Smith made to Flannery on April 7 had no connection whatsoever with the subsequent transfer hearing before Judge Brieant. For this reason, § 5032 of the Juvenile Delinquency Act offers no valid basis for the suppression of these statements.

18 U.S.C. § 5033

This provision of the Juvenile Delinquency Act reads as follows:

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

Defendant claims that the Government's conduct violated the section because the Miranda warnings were not given to him "in language comprehensive [sic] to a juvenile" and he was not "taken before a magistrate forthwith." The Court finds instead that Smith understood the rights as they were read to him and that no unreasonable delay elapsed between his arrest and arraignment.

As noted earlier, Smith was given the Miranda warnings on at least three separate occasions. Each time, he indicated an understanding of his rights to the particular Government official. It is noteworthy that Smith, who was

approximately 17-1/2 years old at the time of his arrest, was not a stranger to law enforcement procedures. He was the subject of four prior arrests, one of which culminated in a conviction. Being "street wise," he was probably familiar with the basic Miranda warnings.

Moreover, Ida Brown, who is defendant's legal guardian as well as his grandmother, was present during the initial arrest of her grandson. She witnessed Detective Carbone's explanation of the nature of the charges against Smith and his constitutional rights with respect to those charges. Detective Carbone, no doubt sensing Mrs. Brown's grave concern for her grandson, told her where the defendant would be taken and gave her a telephone number where the detective could be reached or a message left for him.

The Court finds the defendant's rights to have been fully protected. These rights could have been asserted either by Smith, who indicated his understanding of the Miranda warnings each time they were read to him, or by his grandmother, who was present during Smith's arrest. No more is required by the Constitution or the statute.

Defendant's contention that he was detained for an unreasonably long period of time prior to arraignment is not sustained by the evidence. The two cases relied upon by defendant in this regard are based on fact patterns

peculiarly distinct from the circumstances in this case. United States v. Binet, 442 F.2d 296 (2d Cir. 1971), and United States v. Glover, 372 F.2d 43 (2d Cir. 1967), both were appeals from juvenile delinquency adjudications; Roland Smith, by contrast, was prosecuted as an adult after Judge Brieant found that a transfer to adult status would be "in the interest of justice." 18 U.S.C. § 5032. Indeed, by virtue of age and severity of crime, the defendants in Binet and Glover could not have been proceeded against as adults. According to § 5032, only "a juvenile sixteen years and older alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony punishable by a maximum penalty of ten years imprisonment or more, life imprisonment, or death" may be transferred to adult status. The crimes committed by Binet and Glover^{1/} were both punishable by a maximum of five years imprisonment. Additionally, Binet was only fifteen years old at the time of his arrest. The crime for which Roland Smith was indicted was a bank robbery accomplished with the use of a shotgun. Both customers and bank employees were certainly put in fear of their lives and might conceivably have been killed. Congress, recognizing the severity of this increasingly frequent crime, has made it punishable by up to twenty-five years imprisonment.

In addition to considering the nature of the alleged offense, other factors had to be weighed by Judge Brieant before he could grant the Government's motion to transfer Smith to adult status. These factors include the juvenile's background and maturity as well as his prior delinquency record. See 18 U.S.C. § 5032.

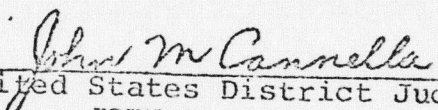
The above discussion makes clear that juveniles transferred to adult status are in a separate category from those prosecuted in juvenile delinquency proceedings, thus distinguishing Binet and Glover from the case presently before this Court. Although Smith, because of his age, enjoys the protections afforded by the Juvenile Delinquency Act, a determination of what constitutes such protection can be made only after examining the facts of each case. That Congress provided for, and Judge Brieant effectuated, Smith's transfer to adult status indicates that a youth in his position does not need the depth of protection extended to Binet and Glover.

Further factual distinctions also may be drawn between Roland Smith, on the one hand, and Binet and Glover, on the other. Whereas one-half of the eight-hour delay between Binet's arrest and arraignment was completely unexplained, and more than sixteen hours elapsed between Glover's arrest and arraignment, the five-hour delay before Smith was

brought before a magistrate was shown to have been reasonable under the circumstances. The Government produced ample documentation of the events that occurred during this time period. Even the forty-minute interview with Assistant United States Attorney Flannery, during which the statements in question were given, was necessary both for bail purposes and to aid in the apprehension of the fourth bank robber. Compare Binet, supra, 442 F.2d at 299.^{2/}

In sum, the Court finds that Roland Smith was not detained for a longer period than was necessary. The defendant's rights, as guaranteed by § 5033 of the Juvenile Delinquency Act, were in all respects observed. This final basis for suppression of the statements given to Flannery having failed,^{3/} defendant's motion is denied and the statements are admissible into evidence.

SO ORDERED.


United States District Judge
JOHN M. CANNELLA

Dated: New York, N.Y.
August 19, 1977.

FOOTNOTES

1/ The basis of Binet's adjudication was possession of stolen mail; Glover was accused of having passed a forged money order.

2/ In this regard the facts contrast sharply with those present in Binet. The Second Circuit therein commented on the needlessness of questioning Binet "for the participants in the crime were caught while perpetrating it." Binet, supra, 442 F.2d at 299.

3/ The Court rejects defendant's claim that pre-arraignment questioning of an indigent juvenile by the United States Attorney violates Disciplinary Rule 7-104(A)(1) of the ABA Code of Professional Responsibility.

I hereby certify that a copy of the within petition
has been mailed to the United States Attorney for the South-
ern District of New York.

Barry Bassia

New York, New York
April 27, 1978

